EDITORIAL RESEARCH REPORTS

1959
Vol. II

PRIVILEGED COMMUNICATIONS

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No. 21
Dec. 2

Editorial Research Reports
1156 Nineteenth Street, N.W.
Washington

PRIVILEGED COMMUNICATIONS

A REPORTER as a rule will decline to tell a court, a legislative committee, or other inquirer the name of a person who has given him information used in a news story without attribution. Yet the so-called newsmen's privilege has no more than limited legal standing. Neither the common law nor the federal or state constitutions recognize a right on the part of reporters to refuse to identify a news source at the bidding of competent authority. Certain state statutes alone extend the privilege to journalists within the jurisdiction of state courts.

All the same, most reporters will go to jail rather than disclose the identity of an informant, and the newspapers for which they work will almost invariably support them to the hilt. Paradoxically, however, reporters and publishers alike are of two minds about the advisability of seeking general statutory recognition of a right to protect news sources. The balance of opinion seems to oppose such protection as possibly endangering full enjoyment of constitutional guarantees of press freedom. Meanwhile, certain communications in other areas have been enjoying a privileged status that has come under question only in recent years.

Absence of Basic Right to Refuse Evidence

Legal scholars and professional groups long have debated to what extent a pledge of privacy or compact of secrecy should be allowed to prevail against demands for exposure of the truth in a court of justice. Recent judicial decisions have been remolding the concept of privileged communications between attorney and client, physician and patient, clergyman and penitent, and husband and wife. They have also established some legal guidelines on claims of privilege in the practice of journalism.

Under rules of evidence, witnesses in a legal proceeding are required to answer all questions put to them. Al-

though certain well-defined exceptions exist, the fundamental maxim is that the public is entitled to every man's evidence. The Sixth Amendment to the Constitution of the United States specifies: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

The recent trend is considered to be away from any extension of professional privileges. The late John H. Wigmore, an authority on evidence, observed in 1940: "The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." [1]

Recognition of Privilege by Certain States

Maryland was the first state to grant statutory protection to newspapermen who decline to disclose sources of information. The Maryland law, enacted in 1898, stood alone for 33 years. New Jersey adopted a similar statute in 1931, and a flurry of new activity by proponents of such legislation shortly after World War II brought to an even dozen the total of state laws recognizing the newsmen's privilege.[2] Legislatures of a score of additional states have considered but failed to vote final approval of laws of this kind.

The 12 state statutes granting immunity are almost as definite in support of an unqualified privilege to refrain from disclosing news sources as legal theory is opposed to extension of such a privilege. The Arkansas law conditions granting of the privilege on "good faith," lack of "malice," and "the interest of the public welfare," but the usual provision simply makes the privilege available without qualification in "any legal proceeding." A few of the laws authorize granting of the privilege also in connection with testimony sought by legislative committees. Federal courts, recognizing state rules on admissibility of evidence, allow the privilege to be invoked in civil cases in those states where it is given statutory recognition.

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[1] *Wigmore On Evidence* (3rd Edition, 1940), Section 2192.

[2] The 12 states in which such laws are now in effect are Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio and Pennsylvania.

Privilege bills affecting newsmen were introduced in Congress and at least 11 state legislatures[3] in 1959. Fresh interest in the question had been raised by the case of Marie Torre, television columnist of the *New York Herald Tribune*, who served a 10-day jail term after being found guilty of contempt of a federal court for refusing to disclose a confidential source of information. The only bill to become law during the year was an amendment to the Ohio statute to make it cover radio and television newsmen as well as the newspaper and wire service reporters already covered.

A measure offered in the upper house of Congress by Sen. Kenneth B. Keating (R N.Y.) would exempt reporters from the requirement to identify confidential informants in the federal courts or before committees of Congress "unless such disclosure is necessary in the interest of national security." Similar bills were introduced in the House, but no hearings were held or other action taken before the first session of the 86th Congress came to a close last Sept. 15. Repeated efforts since 1929 to persuade Congress to give the newsmen's privilege statutory recognition have been to no avail.

Opposing Views Among Newsmen on Immunity

Proponents of the newsmen's privilege contend that the public benefit which accrues from it far outweighs any detriment to the administration of justice. Operation of a free press, they insist, depends on protection of news sources, for if suppliers of sensitive information ran the risk of exposure, sources of news often of great public importance would dry up. Further, it is asserted that enactment of the appropriate legislation would merely give legal recognition to a code of conduct that has been in effect in this country since the days of the colonies. One advocate of the privilege said last winter that "If we retreat on this one—if we surrender on the matter of reporter's confidence or oppose such legal protection—then our freedom of information fight falls on its face and becomes meaningless." [4]

Opposition from the press itself, however, appeared to hold back the progress of efforts to extend the newsmen's

[3] Connecticut, Illinois, Iowa, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Utah, Vermont.

[4] Speech by Oxie Reichler, editor of the *Yonkers* (N.Y.) *Herald Statesman*, before New York State Society of Newspaper Editors, Feb. 2, 1959, at New York City.

privilege. The Connecticut Daily Newspapers Association adopted a resolution last spring recognizing that "under certain circumstances news sources must be protected for the benefit of the public," but stating that "for the protection of these rights we rely confidently on our courts." A representative of the *Toledo Blade* told an Ohio state legislative committee: "The press—and radio and television, too—run a serious danger when they seek to have their constitutional guarantee of freedom buttressed by legislative action. What a legislature gives a legislature might take away." The *Rome* (N.Y.) *Sentinel* voiced a fear common in some quarters of the profession of journalism when it declared editorially on Feb. 5 that "If the press is to have unusual privileges, it also will get close governmental controls, and that is not the way to preserve the right of the people to know."

Clark R. Mollenhoff, Washington correspondent of the Cowles publications, observed later that month that immunity for newsmen would "open a Pandora's box." Mollenhoff said he would "hate to think what would happen" if too many "irresponsible individuals" were free to act without restraint under laws relieving them of obligation to divulge their sources.[5] The American Civil Liberties Union concluded that none of the proposed bills to establish a reporter's privilege was satisfactory. It asserted on March 16 that state laws which establish an absolute privilege can "defeat a public or private right of access to due process."

Position of American Newspaper Guild

Action at the convention of the American Newspaper Guild last June made evident the deep division of opinion among newspapermen themselves as to the wisdom of seeking statutory recognition of the privilege, or indeed of invoking it on all occasions. The delegates on June 25 reaffirmed a statement of principle, written into the Guild's code of ethics in 1934, which declared that newsmen in all cases "shall refuse to reveal confidences or disclose sources of confidential information." However, the pertinent resolution was adopted by a majority of only 9½ votes (213¾ to 204¼). A large minority had favored a resolution which would have limited assertion of a privilege to stand silent to cases where the public interest would be adversely affected by failure to publish news that could be

[5] Statement broadcast on Radio Station WWDC, Washington, D. C., Feb. 28, 1950.

obtained only if the reporter gave his word not to divulge the source.

Opposition of legal scholars to enactment of new legislation has buttressed the negative press reaction. Jurists have pointed out that the newsmen's privilege fails to meet classical tests used to weigh the need for immunity, particularly the condition that a privileged communication originate in the confidence that it will not be disclosed. In the case of communications to reporters, the information is intended to be disclosed; only the source is to remain hidden.

Recent Torre Case and Freedom of the Press

The Marie Torre case lacked elements needed to mobilize public support for privilege legislation. Shortly after Sen. Keating introduced his bill, he declared that there was "a job of public relations to be done" if the communications media wanted to get legislation on the books.

Miss Torre's troubles arose out of a statement in her *Herald Tribune* column on Jan. 10, 1957, quoting an unidentified Columbia Broadcasting System executive to the effect that the actress Judy Garland had an "inferiority complex," could not "make up her mind about anything," and was "terribly fat." During pre-trial examination in a $1,393,333 libel and breach-of-contract suit filed by Miss Garland against C.B.S., Miss Torre refused to identify the executive she had quoted. U.S. District Judge Sylvester J. Ryan found the columnist guilty of contempt of court and on Nov. 12, 1957, sentenced her to 10 days in jail. The U.S. Circuit Court of Appeals upheld the conviction on Sept. 30, 1958, and the Supreme Court on Dec. 8, 1958, refused to grant a review. Miss Torre went to jail last Jan. 5.

Miss Torre not only had entered a plea of privilege but also had contended that to force her to identify the source of her information would violate the constitutional guarantee of freedom of the press. Judge Potter Stewart, later appointed to the Supreme Court, wrote the opinion of the Circuit Court. Stewart accepted the hypothesis that compulsory disclosure of a journalist's confidential sources of information might entail an abridgement of press freedom by imposing limitations upon the availability of news. "But freedom of the press," he added, "precious and vital though

it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of a witness in the present case justified some impairment of the First Amendment freedom."

Judge Stewart decided that the right of the press was less central to democratic values in the case at issue than was the right of a citizen to compel testimony in his behalf in court. He observed that the duty of a witness to testify in a court of law has "roots fully as deep in our history as does the guarantee of a free press." The Supreme Court's refusal to review left uncertain where the line between freedom of the press and fair adjudication should be drawn when these rights seem to be in conflict.

Conditions Mitigating Denial of Special Privilege

Taking much of the steam out of the impetus for privilege legislation is the generally recognized right of federal courts, even without statutory authority, to allow a reporter to remain silent in any case where the court decides that the interests of justice do not require disclosure. Rule 26 of the Federal Rules of Criminal Procedure, which went into effect on March 21, 1946, after approval by Congress, provides in part as follows:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The Supreme Court, and possibly lower federal courts, would appear to have the same power, under Rule 43(a) of the Civil Rules, to interpret principles of the common law. Hence the principles actually governing need not conform exactly with the common law as it formerly existed. However, as noted, the courts almost universally have ruled that reporters have no fundamental right to refuse to disclose sources of news. In states without privilege statutes, the reporter may be able to keep his secret only if he is willing to go to jail.[6]

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[6] It has been said that John Peter Zenger, editor and publisher of the *New York Weekly Journal*, launched the tradition that a reporter will go to jail rather than disclose a confidential news source. The Zenger case in 1734 and 1735 was noteworthy chiefly for establishing truth as a defense against a charge of libel. However, Zenger might have avoided arrest for seditious libel, and confinement for nine months while awaiting trial, if he had identified the author of an anonymous letter published in his paper which aroused the ire of the royal governor of New York. The governor "issued a proclamation offering a reward of £50 for the discovery of the author of said 'Scandalous, Virulent and Seditious Reflections.'"—George Henry Payne, *History of Journalism in the United States* (1920), p. 58.

If no special privilege is allowed and the circumstances of the case warrant, a newsman under pressure to disclose a source of information may fall back on a broad privilege recognized by all constitutions and courts in the United States; that is, the Fifth Amendment guarantee that no man shall be compelled to give evidence that may tend to incriminate him. This was the course taken by George Burdick, city editor of the *New York Tribune*, when he was summoned before a federal grand jury and asked where the *Tribune* had unearthed information on alleged customs frauds exposed in an article appearing in that paper on Dec. 31, 1913.

Burdick claimed immunity on the ground of possible self-incrimination. The U.S. attorney thereupon obtained President Wilson's signature, Feb. 14, 1914, to "a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act."

When Burdick declined to accept the tendered pardon and persisted in refusing to disclose the news source, he was taken before the district court, adjudged guilty of contempt, and committed to the custody of a U.S. marshal. The judgment was appealed directly to the Supreme Court. In argument there, Dec. 16, 1914, the Solicitor General contended, and counsel for Burdick denied, that the President had power to grant a pardon for an offense that had not been established or defined and before the person supposed to have committed it had been convicted.

The Supreme Court avoided ruling on that question, but it held on Jan. 25, 1915, that Burdick was under no obligation to accept the tender of a pardon, and that his refusal to do so made the pardon ineffective. The Court admonished that the President's pardoning power and the right of a witness not to be forced to incriminate himself "must be kept in accommodation." The contempt proceedings accordingly were dismissed.[7]

[7] Burdick v. United States, 236 U.S. 79 (1915).

Position of the Press in Other Forums

SPECIAL PRIVILEGE for reporters is advocated with increased vigor when it comes to testimony before committees of Congress or state legislatures. Legislative tribunals lack the sanctity and safeguards of courts. Their inquiries, moreover, are of a different order from those conducted to determine guilt or innocence in a criminal prosecution.

The authority of Congress to compel disclosures, under penalty of contempt proceedings, is not spelled out in the Constitution but is implied in the grant of legislative power. A legislative purpose is presumed in authorization of a congressional investigation. The contempt involved in resistance to fulfillment of that purpose is punishable either directly by Congress or by the federal courts.

The press of legislative affairs has prompted Congress in recent years to use the courts rather than its own power to try witnesses for contempt before committees. Regarding this trend, the Legislative Reference Service of the Library of Congress said in a 1954 study prepared for the Senate Judiciary Committee that "Undoubtedly the prestige of the Legislative Branch of the government would be enhanced if it occasionally handled the punishment of contempt in its own right."

Action of House and Senate in Contempt Cases

Whatever the case today for exempting newsmen from questioning by legislative committees, precedents going back more than a century amply support the right of Congress to disregard any plea of privilege they may make. In 1857 J. W. Simonton, a Washington correspondent of the *New York Times*, wrote in a dispatch to his paper that members of the House of Representatives were taking bribes in connection with pending public lands legislation. Simonton was called before a select committee and asked the source of his information. When he refused to identify his informant, he was ordered detained by the sergeant-at-arms for the remainder of the session or until he purged himself of contempt.[8]

[8] Upon further questioning, nearly three weeks later, Simonton gave responses that satisfied the committee and he was released.

Two Washington correspondents of the *New York Tribune,* Zeb L. White and Hiram J. Ramsdell, incurred a like penalty in 1871. They refused to tell a Senate committee how they had come into possession of a copy of the Treaty of Washington, providing for arbitration of the Civil War *Alabama* claims, while the treaty was still under consideration in executive session of the Senate. Commitment to the custody of the sergeant-at-arms for the remainder of the session followed.

The *Akron Beacon-Journal* published a story on Jan. 21, 1943, reporting that unionized merchant seamen had refused to unload vital cargo on Guadalcanal when U.S. Marines were under Japanese attack there the preceding year. Charles C. Miller, city editor of the paper, called before a House Naval Affairs subcommittee to explain, refused to give the names of Marine veterans who had supplied the information. The subcommittee refrained from pressing Miller, but it concluded from other evidence that the story had been based on false statements.

Albert Deutsch of the New York City newspaper *P.M.* declined in May 1946 to identify Veterans Administration officials who had furnished the information for a series of articles critical of the V.A. medical program. The House committee that had sought the information voted to recommend that the House cite Deutsch for contempt. However, the committee backtracked when its move provoked strong criticism.

Risks in Publication of Classified Information

So-called leaks of classified information are a potential source of trouble for reporters. What would happen if the information published contained quotations from classified documents and the newsman refused to disclose how he had got hold of the information? No court cases have arisen, but it has been suggested that the language of the federal espionage statute might make both news gatherer and his informant guilty of espionage. One section of that statute applies to:

> Whoever, lawfully having possession of, access to, control over, or being entrusted with . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated . . . the same to any person not entitled to receive it . . .

Another section makes the penalties of the law applicable to any person having unauthorized possession of information relating to the national defense.

Refusal of a reporter to divulge sources of information of this character might lead to curious contradictions—assertions, for example, that a breach of national security was vital to the public interest, or that protection of an informant who might be raising a threat to national security was necessary to preserve a free press.

The *New York Times* on March 19, 1959, published the first news of Project Argus, in which three atomic weapons were detonated 300 miles above the South Atlantic in the late summer of 1958. The information had been classified. The *Times* explained that it had withheld publication until it became evident that Soviet scientists were familiar with the theoretical principles involved. It said also that a high official at the Pentagon had recommended an official announcement. Donald A. Quarles, then Deputy Secretary of Defense, told newsmen the day the story came out that the *Times* was not playing the game the way he would like to see it played, though he would not confirm that he was in effect accusing the paper of a security breach. No move was made to press the *Times* for the source of its information, but the incident pointed up the potentialities inherent in such disclosures.

Recognized Confidential Communications

HISTORICAL CLAIMS to privilege have been losing force in recent years; this fact has been demonstrated by changes in the ancient common law rule that husband and wife were incompetent as witnesses for or against each other. This rule, formerly accepted as controlling in this country, rested in part on a desire to foster peace in the family and in part on doubts about the reliability of testimony of witnesses who might be tempted by strong self-interest to testify falsely. An exception to the rule was recognized in a prosecution of one spouse for an injury inflicted upon the other. Congress in 1887 authorized either spouse to testify in prosecutions against the other in a federal court for bigamy, polygamy or unlawful cohabitation. Federal legislation in 1917, reaffirmed in 1952, made wives and husbands competent to testify against each other also in prosecutions for importing aliens for immoral purposes.

The Supreme Court in 1933 threw out that part of the common law rule which excluded testimony by spouses *for* each other. This was in keeping with a modern trend toward the practice of permitting interested witnesses to testify and of leaving it to the jury to assess their credibility. Because defendants were uniformly allowed to testify in their own behalf, the Court concluded that there was no longer a good reason to prevent them from using their spouses as witnesses.

Most states still retain the rule that bars spouses from testifying *against* each other, though exceptions are allowed in some classes of cases. The Justice Department attempted to persuade the Supreme Court in 1958 to admit a spouse's *adverse* testimony in all federal criminal proceedings.[9] The Court, however, reaffirmed the ancient rule that wives may not testify against their husbands, either under compulsion or voluntarily, in the general run of cases.

The case then under consideration was a Mann Act prosecution of James Clifton Hawkins, of Dogpatch, Okla. Hawkins, convicted in federal District Court of transporting a 17-year-old girl from Arkansas to Oklahoma in 1955 to engage in prostitution, was sentenced to five years in the penitentiary. During the trial his wife had been per-

[9] Hawkins v. U.S. (358 U.S. 74).

mitted to testify over his objection. The Supreme Court ordered a new trial. Justice Hugo L. Black, delivering a unanimous opinion, noted that the limited nature of exceptions by most states to the old rule "show there still is a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences."

Black noted that Congress in 1946 confirmed the authority of the Supreme Court to determine admissibility of evidence under "principles of the common law as they may be interpreted . . . in the light of reason and experience." [10] He went on to say: "This Court is not now prepared to abandon so much of the old common law rule as forbade one spouse to testify against the other over the latter's objection." The opinion thus left the Court free to limit the exclusionary rule in the future if "reason and experience" should warrant a change.

Modifications in the Lawyer-Client Privilege

The rationale for protecting confidential relations between an attorney and his client is based on the assumption that full disclosure by the client to the attorney is necessary for effective operation of the legal system. Such disclosure, the argument goes, can be assured only by guaranteeing that the client's confidence will be preserved.

In general, the privilege is that of the client. If he does not object to disclosure in court of something he has told his lawyer, the attorney must testify. All rules affecting the attorney-client relationship and other privileged communications seem to be based on common ground. If a privilege to suppress facts is to be recognized at all, the limits should be sharply defined and an effort made to achieve a balance between the advantages and disadvantages likely to result from recognition. It is held in most jurisdictions that communications between an attorney and his client are not privileged if their purpose is the commission or furtherance of a crime by the client. The American Bar Association recommended in 1938 that the attorney-client privilege be disallowed as to communications by which a lawyer acts as a go-between or agent in preparation of a crime or fraud or in suppressing the means of its discovery.

[10] Federal Rules of Criminal Procedure, 26.

Despite the general privilege, if communications between an attorney and his client are overheard by a third person, that person may testify to their content. A problem arises, however, if the third person acquired the information by eavesdropping or wiretapping. Listening in by federal officers on telephone conversations between an accused person and his attorney has been held to violate the Sixth Amendment guarantee that an individual shall "have the assistance of counsel for his defense." Evidence obtained by wiretapping is barred in federal courts by a provision of the Federal Communications Act.[11] States have moved to shore up their defenses against such intrusions. New York amended its law in 1958 to bar the testimony of any person who obtained, without knowledge of the client, evidence of a communication between him and his lawyer.

The issue of eavesdropping was raised last summer during the trial of Bernard Goldfine for contempt of Congress. U.S. District Judge James W. Morris refused to dismiss the charges on Goldfine's claim that his right to private legal consultation had been violated by the eavesdropping of an investigator for the House Special Subcommittee on Legislative Oversight, who had "bugged" his hotel rooms. Goldfine then changed his plea from not guilty to nolo contendere (no contest). Judge Morris on July 24, 1959, imposed the maximum sentence for contempt of Congress but suspended both the one-year prison term and the $1,000 fine on condition that Goldfine answer the questions of the House subcommittee if it should call him back for that purpose.[12] The judge indicated that mitigating circumstances, particularly the eavesdropping incident, had influenced him to suspend the sentence.

Question of the Physician-Patient Relationship

The relationship between physicians and patients never gained privileged status under the common law. From early days to the present, English judges have refused to concede that confidences given to a physician enjoy any special legal privilege. New York in 1828 became the first American jurisdiction to grant a physician-patient privilege by statute. About one-half of the states now recognize such a privilege. Wigmore has said that support for the immunity derives mainly from "the weight of professional

[11] See "Eavesdropping Controls," *E.R.R.*, 1956 Vol. I, pp. 71-76.

[12] Goldfine has been recalled for renewed questioning at hearings of the House subcommittee opening Dec. 9.

medical opinion, pressing upon the legislature; and that opinion is founded on a natural repugnance to becoming the means of disclosure of a personal confidence." The Hippocratic oath, still recited by every medical student on his admission to the profession, includes a pledge never to reveal what may "come to my knowledge in the exercise of my profession, or outside my profession or in daily commerce with men" if it concerns that "which ought not to be revealed."

The physician's privilege is invoked chiefly in cases involving the mental capacity of a testator; the nature of a personal injury; or the state of an insured person's health. The American Bar Association's Committee on Improvements in the Law of Evidence commented some years ago:

> The odd thing about the privilege is that it is usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, and which only the tribunal of justice must not learn about. In personal injury claims particularly is the privilege ridiculously incongruous; for the plaintiff comes into court alleging a specific injury and then refuses to let the court listen to testimony concerning the injury.[13]

The Bar Association's committee did not call for outright abolition of the privilege, but it recommended that it be qualified along lines followed in a North Carolina law. That statute provides that the presiding judge of a superior court may compel disclosure if in his opinion disclosure is necessary to "the proper administration of justice." This proviso enables the privilege to be suspended when its observance might interfere with exposure of fraud.

The case for a privilege is much stronger for psychiatrists than for other types of health practitioners. In one civil suit the judge, without statutory support, upheld a claim of privilege by a psychiatrist in an action for alienation of affections. The psychiatrist had been put on the stand by the husband to testify concerning information his wife had disclosed during psychiatric consultations.[14]

Protection of Confidences to Priest or Pastor

Court treatment in the states of communications between the clergy and parishioners is not uniform, but the laws of only 13 states[15] and the District of Columbia

[13] *A.B.A. Reports*, Vol. 63 (1938), p. 590.

[14] Binder *v.* Ruvell, Circuit Court of Cook County, Ill., June 24, 1952.

[15] Alabama, Connecticut, Delaware, Illinois, Maine, Massachusetts, Mississippi, New Hampshire, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia.

lack specific provisions to protect such confidences. Jurisdictions without statutes encounter embarrassing legal questions. A Washington, D.C., pastor, threatened by a contempt of court action, was forced in 1957 to testify in a divorce case in which the principals had sought his counsel. Nation-wide attention was drawn the following year to the case of the Rev. James Glisson of Tennessee, who was fined $50 and given a 10-day suspended jail sentence for refusing to testify in a divorce case. Former Gov. Frank Clement pardoned the Baptist pastor, and the Tennessee legislature passed a bill granting clergymen immunity from testimony on confidential information.

It is considered probable that the priest-penitent privilege was a part of the common law of England in the centuries preceding the Reformation. After the Reformation the privilege was not generally recognized; in fact, it appears to have been abrogated or abandoned.[16] Consequently, it has been said that it can now be recognized only by statute. U.S. Circuit Court Judge Charles Fahy declared in a widely discussed opinion this year, however, that recognition of the privilege in federal courts does not depend upon a finding either that it existed uniformly at common law or that it has been approved by act of Congress. Fahy said that "when reason and experience call for recognition of a privilege which has the effect of restricting evidence, the dead hand of the common law will not restrain such recognition." [17] The judge added that sound policy concedes to religious liberty a rule of evidence that a clergyman shall not disclose in a trial the secrets of a penitent's confession to him, "at least absent the penitent's consent."

The case before the Circuit Court of Appeals involved a Lutheran minister who had been called to testify in a lower court in the District of Columbia as a character witness for a woman accused of chaining her children. The minister had been disturbed when the woman denied the charge. He told the trial judge in chambers that he had felt unable on the stand to say all that his conscience impelled him to say. The judge thereupon recalled the minister as a witness for the court, and he testified that the defendant had admitted the truth of the charge to him in private. Conviction followed in district court, but

[16] Henry VIII ruled that confessions made to a Roman Catholic priest were not privileged.

[17] Mullen v. U.S., 263 F. 2nd 275 (1959).

Judge Fahy ruled that the minister's testimony was not admissible and ordered a new trial.

Agitation over the lower court's handling of the case led to introduction in the 86th Congress of a clergyman's privilege bill for the District of Columbia. The measure would prohibit examination of any minister in D.C. courts in connection with communications made by or to him in his professional capacity, without the consent of the other party. U.S. Attorney Oliver Gasch voiced the belief at hearings on the bill that legislation was unnecessary in view of Judge Fahy's "very full and detailed opinion." But numerous religious organizations and the D.C. Bar Association endorsed the measure. It passed the House by voice vote and cleared the Senate with amendments shortly before adjournment. Final action, either by House acceptance of the Senate amendments or by resolution in conference of the differences between the two versions, awaits reconvening of Congress in January. Other bills pending in House and Senate would make the privilege applicable in all federal courts.